INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	4
Argument	7
Conclusion	13

CITATIONS

Cases:	
Budd v. *Commissioner*, 7 T. C. 413, affirmed, 177 F. 2d 198	8, 12
Deitsch v. *Commissioner*, 249 F. 2d 534	10, 11
Fleming v. *Commissioner*, 14 T. C. 1308	8
Gantz v. *Commissioner*, 23 T. C. 576	8
Hirshon, Estate of, v. *Commissioner*, decided December 5, 1957 (58-1 U. S. T. C., par. 9116), modified on rehearing, January 3, 1958 (58-1 U. S. T. C., par. 9192)	10, 11
Joslyn v. *Commissioner*, 230 F. 2d 871	8
Leslie v. *Commissioner*, 10 T. C. 807	8
Mandel v. *Commissioner*, 185 F. 2d 50	8, 12
Moremen v. *Commissioner*, 27 T. C. 520	8
Weil v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U. S. 958	10, 11
Statutes:	
Internal Revenue Code of 1939:	
Sec. 22 (k) (26 U. S. C. 1952 ed., Sec. 22 (k))	2, 7, 8
Sec. 23 (u) (26 U. S. C. 1952 ed., Sec. 23 (u))	3, 7
Miscellaneous:	
H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 71-72, 73-74 (1942-2 Cum. Bull. 372, 406, 407)	8
S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 504, 568-570)	8
Treasury Regulations 111:	
Sec. 29.23(k)-1	3
Sec. 29.23(u)-1	4, 8

457062—58

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 764

JO EISINGER AND LORAIN B. EISINGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 41–45) is not officially reported. The opinion of the Court of Appeals (Pet.–A 1–10)[1] is reported at 250 F. 2d 303.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1957. (Pet.–B 11.) The petition for a writ of certiorari was filed on February 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

---

[1] "Pet.–A" and "Pet.–B" references are to the pages of Appendices A and B, respectively, to the petition for certiorari filed with this Court.

QUESTION PRESENTED

Whether the courts below properly construed the particular terms of a property settlement agreement incorporated in a divorce decree as fixing a portion of periodic payments to be made by the taxpayer-husband as a sum payable for support of his minor children within the meaning of Section 22 (k) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(k) [As added by Sec. 120 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment,

as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *
(26 U. S. C. 1952 ed., Sec. 22 (k).)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [As added by Sec. 120 (b), Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22 (k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.
(26 U. S. C. 1952 ed., Sec. 23 (u).)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22 (k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(*a*) *In general.*—Section 22 (k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a

court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797 (a) (17).

* * * * *

(d) *Payments for support of minor children.*—Section 22 (k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22 (k), is specifically designated as a sum payable for the support of minor children of the husband. * * *

Sec. 29.23 (u)–1. *Periodic Alimony Payments.*—A deduction is allowable under section 23 (u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22 (k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22 (k)–1. (For definition of husband and wife in such cases, see section 3797 (a) (17).)

* * * * *

STATEMENT

The facts as stipulated (R. 35–40) and as found by the Tax Court (R. 41–44) may be summarized as follows:

Pursuant to a decree granted May 26, 1949, by the Circuit Court of Dade County, Florida, the marriage

of the taxpayer[2] to Wilhelmine Eisinger was dissolved. At that time they were the parents of two minor sons, Carl and Lloyd, sixteen and ten years of age, respectively. (R. 42.)

A written property settlement agreement dated March 28, 1949, and modified on May 19, 1949, was incorporated in the decree of divorce. (R. 42.) The agreement read, in pertinent part, as follows (R. 42–43):

> 4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, and in and for Dade County, in Chancery, No. 112550–C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage

[2] Lorain B. Eisinger, the present wife of Jo Eisinger, is involved solely because of the filing of joint returns for the taxable years. Jo Eisinger is referred to, individually, as the taxpayer.

until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week, during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 Dollars ($62.50) per week.

* * * * *

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. * * *

The Commissioner disallowed the sum of $1,925 in 1949 and the sum of $3,364.50 in 1950 of the total

amounts claimed as deductions for alimony payments by the taxpayer on the ground that such amounts were paid for the support of his minor children. (R. 43–44.)

The Tax Court (R. 41–45) and the Court of Appeals (Pet.-A 1–10) affirmed the Commissioner's determination.

ARGUMENT

1. The decision of the court below, affirming the decision of the Tax Court, is clearly correct. Section 23 (u) of the Internal Revenue Code of 1939, *supra*, p. 3, provides that a husband who is divorced or legally separated from his wife may deduct, in computing his net income, payments made by him to his wife which are *includible* in her gross income under Section 22 (k) of the 1939 Code, *supra*, pp 2–3. So far as here pertinent, Section 22 (k) provides that a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance shall include in her gross income periodic payments received subsequent to such decree. Section 22 (k) excludes, however, from that which the wife is required to include in her gross income the part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money, as payable for the support of minor children of the husband.

Congress intended, in enacting Sections 22 (k) and 23 (u), to tax the wife on the amount of money given her and, to that extent, permit deduction thereof by the husband. Where, however, minor children are

involved, Congress did not require the wife to include in her gross income amounts allocated by the parties for the support of their minor children, and amounts not included in her income may not be deducted by the husband.[3]

Whether or not a particular instrument fixes a portion of the amounts payable by the husband to the wife as payable for the support of the minor children within the meaning of Section 22 (k) necessarily depends upon the particular terms of the agreement. Certainly this is not a question appropriate for review by this Court.

The courts have held that in construing such instruments the contract must be read as a whole, a single sentence, phrase, or word not being decisive; and that in identifying the portions of the payments allocable to the support of minor children and not intended for the wife's support, it is proper to consider provisions for reduction in payments to the wife in the case of the death of a minor child, in the case of a minor child reaching his majority, and in the case of the remarriage of the wife. See cases cited in footnote 3, *supra*.

---

[3] *Mandel* v. *Commissioner*, 185 F. 2d 50 (C. A. 7th); *Budd* v. *Commissioner*, 7 T. C. 413, affirmed, 177 F. 2d 196 (C. A. 6th); *Joslyn* v. *Commissioner*, 230 F. 2d 871, 879 (C. A. 7th); *Morsman* v. *Commissioner*, 27 T. C. 520; *Gantz* v. *Commissioner*, 23 T. C. 576; *Fleming* v. *Commissioner*, 14 T. C. 1308; *Leslie* v. *Commissioner*, 10 T. C. 807; Treasury Regulations 111, Section 29.23 (u)-1, *supra*, p. 4; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 71-72, 73-74 (1942-2 Cum. Bull. 372, 409, 429); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 504, 568-570).

In this case the written property settlement agreement was incorporated in the Florida decree of divorce and at that time there were two minor children of the marriage. (R. 42.) The taxpayer contended before the Tax Court (R. 44) and the Court of Appeals (Pet.-A 5) that the agreement did not designate a sum payable for support of the minor children; hence that he is entitled to deduct the total sum of $125 a week paid by him under the agreement. The courts below, however, reading the agreement as a whole, concluded that $62.50 of the $125 weekly payments was earmarked by the parties as payable for support of the taxpayer's two minor children, and this construction was plainly warranted by the terms of the agreement.[4]

2. There is no direct conflict. Since determination of the question depends upon the construction of the particular agreement in issue, the taxpayer's contention (Pet. 10–11, 13) that the decision below is con-

[4] In summary, the provisions of the settlement agreement that were relied on by the Court of Appeals (Pet.-A 8) and which support its conclusion are: (1) that it is the intention of the parties that if each child attains the age of 21 the taxpayer is to pay the wife merely $62.50 per week; (2) that if the wife does not remarry, the original $125 per week payments are to be reduced by $31.25 as each child reaches majority; (3) that the $125 per week payments are to be reduced by $31.25 per week upon the death of either child prior to his majority; (4) that if the wife does not use the money for support of the children the taxpayer can pay the money to the children or for them and accordingly reduce the total weekly payments; and (5) that if the wife remarries, all payments for her are to cease and the taxpayer will pay merely $31.25 per week for the support of each child until such child attains the age of 21.

trary to the decisions in *Deitsch* v. *Commissioner*, 249 F. 2d 534 (C. A. 6th), *Estate of Hirshon* v. *Commissioner* (C. A. 2d), decided December 5, 1957 (58–1 U. S. T. C., par. 9116), modified on rehearing, January 3, 1958 (58–1 U. S. T. C., par. 9192), and *Weil* v. *Commissioner*, 240 F. 2d 584 (C. A. 2d), certiorari denied, 353 U. S. 958, is plainly without merit.

Indeed, the court below expressly agreed with the *Weil* case in its application of the law to the facts, although it did not agree with "the generality of some of its language", nor find the legal position taken there applicable here. (Pet.–A 5.) In the *Weil* case there was an explicit provision in the agreement that the payments to the wife were not to be reduced by reason of the death, majority of the children, or the fact that they no longer resided with her. (Pet.–A 7–8.) Only in the event of her remarriage were the payments to be reduced. While there is language in the opinion of the Court of Appeals in the *Weil* case indicating its disapproval of prior Tax Court decisions, the opinion concludes (p. 588) by adopting the view expressed in many of the decisions of that and other courts already cited, that the instrument "must be read as a whole" and that "no particular formula * * * is necessary." The *Hirshon* case is similar to the *Weil* case on its facts, in that the agreement there also can be read to provide that payments to the wife were not to be reduced by reason of the death, majority of the children, or the fact that they no longer resided with her, but only in the event of her remarriage.

The court below expressed disagreement with the Sixth Circuit's decision in *Deitsch* v. *Commissioner*, *supra* (Pet.-A 10); however, since both courts agree that this question is one of construction, and since both courts agree that the instrument must be read as a whole, this disagreement must be deemed to be factual in nature and to turn upon the Sixth Circuit's construction of the particular settlement agreement. The opinion in the *Deitsch* case fully supports this view. There the husband agreed to pay a specified sum each month to the wife for her support and maintenance, and the support and maintenance and education of his two children. In view of the fact that the payments were to be cut in half on the death, emancipation, or attainment of eighteen years by one of the children, and entirely eliminated if any of these events occurred in the case of both the children, the Tax Court concluded that the entire payments of $250 a month were intended solely for the support of the minor children, even though the agreement specifically stated that the payments were for the support and maintenance of the wife as well as of the children. The Court of Appeals, on the other hand, did not consider that the clauses which provided for cessation of the payments upon these contingencies constituted convincing evidence that the language of the agreement, which expressly declared the payments to be for the support of the wife, as well as of the children, was entirely to be disregarded; and that she could not under the terms of the agreement during the taxable year, when the children were of the ages of three and five, have

expended some or most of the periodic payments for her own support. Expressly considering the settlement contract as a whole, the Sixth Circuit found no provision which indicated that the $3,000 yearly payment was to be made for the benefit of the children alone. The Sixth Circuit did not indicate disagreement with its prior decision in *Budd* v. *Commissioner*, 177 F. 2d 198, but distinguished it on the facts of the particular agreement there involved. The facts in the present case are similar to those in the *Budd* case and in *Mandel* v. *Commissioner*, 186 F. 2d 50 (C. A. 7th), in both of which the Courts of Appeals concluded that the agreements under construction each fixed sums for child support. The agreement here affords even stronger evidence of that intent.

CONCLUSION

The decision below is plainly correct, is not in direct conflict with the decision of another Court of Appeals, and turns upon the interpretation of a particular agreement. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

I. HENRY KUTZ,
MELVIN L. LEBOW,
Attorneys.

MARCH, 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958